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In The

SUPREME COURT of the UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the decision not to renew the employment of a non-tenured state university professor for another academic year for reasons which implicate his First Amendment rights must be accompanied by minimal due process, including a statement of reasons and an opportunity for a hearing.

STATEMENT OF THE CASE

David F. Roth (hereinafter "Roth") was employed by the Wisconsin State University-Oshkosh as an Assistant Professor of Political Science and International Studies during the 1968-1969 academic year. (A. 137, 154) On January 30, 1969, Roth was advised that his teaching contract would not be renewed for the coming academic year. At that point, he had not acquired tenure under § 37.31, *Wis. Stats.*, (1967). (A. 154)

On November 21, 1968, a disturbance involving black students had taken place on campus. Roth publicly criticized the University Administration charging, *inter alia*, that it had suspended the entire body of 94 black students without determining individual guilt in accordance with due process. (A. 137, 142, 154)

On December 17, 1968, Roth's academic performance was evaluated by the members of the Tenure Committee of the Political Science Department which voted unanimously to "highly recommend" Roth's appointment. (A. 135). The conclusion of Roth's five senior departmental colleagues was summarized on a standard evaluation form as follows:

Teaching ability	Excellent
Evidence of professional and scholarly growth	Superior
Evidence of services rendered	Excellent (A. 131-135)

Roth saw this report and reviewed it on December 21, 1968. (A. 135)

On January 22, 1969, Dean Arthur H. Darken, who claimed no personal knowledge of Roth's academic perform-

ance, disagreed with the Tenure Committee recommendation that Roth be retained. (A. 135) His reasons were contained in attached "comments" which are not part of the Appendix or record below. (A. 135) Darken's reasons for disagreeing with these recommendations are included in his memorandum to President Roger E. Guiles, dated January 28, 1969. (A. 125-131, and particularly at A. 129) That memorandum deals with Roth's expressions of opinion and activities in response to the Administration's treatment of black students who were allegedly involved in the disturbance of November 21, 1968.

Darken charged that Roth:

1. As to official duties—

a. "Cavalierly" decided not to give a final examination in "breach [of] a major all-university policy that is in the interest of the students." (A. 125)

b. For two weeks, Roth used ½ to ¾ of the class periods "to discuss the student riot and what the University was or was not doing on the matter." Darken acknowledged Roth "did not, however, urge students to protest or to engage in any improper activities." (A. 125-126) This charge was based on "oral reports by four [unnamed] students." (A. 125)

c. "Dr. Roth did not meet any of his classes on Friday, December 20, the day of the Regents meeting on campus. This was observed personally by Vice President Raymond Ramsden. Dr. Roth, however, attended the Regents session that day." (A. 126)

d. Roth did not respond to a request for a meeting with Vice President Ramsden and was "quoted indirectly in the *Milwaukee Journal* . . . to the effect that he was disregarding the . . . request." (A. 127)

2. "Dr. Roth made public statements on a number of occasions that indicate a very unscholarly approach to the truth and the search for knowledge. . . ." Darken referred to three newspaper articles to support this charge.

The Paper, December 23, 1968: "Many of us feel that the authoritarian and autocratic structure of this unversity is no longer tolerable."

The Paper, January 6, 1969: "The state universities will not be able to keep good professors if they are told they can't teach this or that in their classes."

The Paper, January 9, 1969: "We won't talk to any Mickey Mouse committee [the Advisory Committee for the Culturally Distinct]." (A. 125-131)

The Darken memorandum was not furnished to Roth, and was not discovered until April 28, 1969, in pre-trial discovery proceedings in District Court. (A. 139)

On January 24, 1969, Darken reconvened a meeting of the Tenure Committee to give his reasons why their unanimous decision to "highly recommend" Roth's retention should be reversed. (A. 130) Roth was not informed of this meeting, nor given prior notice of the evidence Darken was to present. The Department Chairman, Dr. George Willis,[1] who signed the highly favorable departmental evaluation of December 20, 1968, and had personal knowledge of a number of Darken's charges against Roth, was, although a voting member of the committee, also excluded from this meeting. (A. 130, 135, 143)

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[1]At A. 135 the Department Chairman is listed as "Gerry Miller." Respondents assume this reference should read "George Willis."

On January 27, 1969, the four tenured members of the department met with their Chairman, Dr. Willis, and voted as follows (A. 131): Not to retain Dr. Roth (2); Retain Dr. Roth (1); Abstain (2).

Dean Darken reported the results to President Guiles the following day.

> "Consequently, only one member voted in a manner consistent with the original committee vote in mid-December. I am happy, therefore, to be able to make the recommendation that supports the 2-1 vote for non-retention submitted by the Political Science Department's Tenure Committee." (A. 131)

Upon receipt of Dean Darken's report and recommendation, President Guiles reached his decision not to reappoint Roth. (A. 120) Despite his knowledge of the switch in the Tenure Committee's position and of the factual nature of Darken's charges, President Guiles did not undertake a personal investigation of the facts (A. 122-123), nor did he invite Roth to present his version of the facts. Rather, Guiles based his decision entirely on the reasons stated in Darken's memorandum, the second vote of the department, and the recommendations of Dean Darken and Vice President Ramsden. (A. 122-123)

On January 28, 1969, Dean Darken telephoned Roth and notified him that he was not to be retained on the faculty for the 1969-1970 academic year. Roth asked for the reasons but was informed that he was not entitled to an explanation or reasons. (A. 140)

In a letter dated January 30, 1969, President Guiles officially notified Roth of the decision.[2] Guiles neither gave reasons, nor offered Roth a hearing concerning his termination. (A. 124)

President Guiles acted pursuant to Rule II of the Board of Regents of the State Universities which provides:

> "During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case." (A. 121.)

On February 14, 1969, Roth comenced an action under 42 U. S. C. § 1983 in the United States District Court for the Western District of Wisconsin against the Board of Regents and Roger E. Guiles, President of the Wisconsin State University-Oshkosh in which he claimed that the decision not to retain him was made in retaliation for his expression of opinion. Roth also claimed that the university had failed to provide him with either the reasons for the non-retention decision or with an impartial hearing into the merits of such decision in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution. (A. 105, 108) Finally, Roth alleged that the non-retention decision would cause damage to his professional reputation and standing. (A. 107)

On May 16, 1969, Roth moved for partial summary judgment. In his affidavits, Roth responded to the charges in the Darken memorandum and admitted certain public statements critical of the administration; amplified newspaper accounts of public positions he had taken; and flatly

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[2]The University was obligated to notify Roth of its decision by February 1, 1969, or his contract would have been automatically renewed in accordance with University rules. (A. 121, 130). This is to be distinguished from the case of a visiting professor who would have no such expectancy.

contradicted other of Darken's factual assertions. (A. 137-140, 141-143)

On March 12, 1970, the District Court entered a memorandum and order granting part of Roth's motion for summary judgment and denying part of it. Defendants' motion for summary judgment was denied.[3]

In this decision, the District Court pointed out that the substantive standards to be used were not the equivalent of statutory tenure.

> "This standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure. Unless this substantial distinction between the two standards is recognized in case-by-case application of the constitutional doctrine here enunciated, the rationale for the underlying doctrine will be gravely impaired. To be more direct, in applying the constitutional doctrine, the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons." (A. 165-166)

In granting Roth's motion for partial summary judgment, the District Court concluded that:

> "Substantive constitutional protection for a university professor against non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of

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[3]Roth's motion for summary judgment claimed, in part, that the non-retention decision was not based on ascertainable and definite standards. (A. 136) This was denied by the District Court as was defendants' motion which, in effect, claimed that the non-retention could have been made for any reason and without any procedural safeguards. (A. 113, 157) Neither of these issues has been appealed and the sole issue before this Court is the District Court's order to provide minimal procedural safeguards.

a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." (A. 167)

Because Roth had requested these procedural safeguards, the District Court stayed further proceedings on the remaining substantive issue of whether the non-retention was based upon Roth's expression of opinion or was arbitrary. In so doing, the District Court stated its belief that as a result of the provision of a statement of reasons and a hearing, "the remaining issues in this case will have been clarified and . . . will become more amenable to resolution." (A. 174)

On April 10, 1970, defendants filed a Notice of Appeal (Docket Entry 34) and moved for a stay of the District Court's March 12, 1970, order pending appeal. (Docket Entry 37) An order granting such a stay was entered May 15, 1970. (Docket Entry 38)

On July 1, 1971, the United States Court of Appeals for the Seventh Circuit rendered its decision affirming the District Court. In affirming the decision to extend to professors faced with non-retentian procedural protections including a "glimpse at the reasons and a minimal opportunity to test them," the Court of Appeals observed that:

> "The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (A. 181)

On July 14, 1971, the defendant's motion for a stay of the Court of Appeals mandate was granted and on August 3, 1971, defendants' petition for a Writ of Certiorari was filed with the Supreme Court of the United States. The petition was granted on October 26, 1971.

SUMMARY OF ARGUMENT

Because of the danger that the reasons for not retaining a non-tenured university professor will implicate fundamental First Amendment values, state universities must be constitutionally required to provide non-tenured professors with a statement of reasons for their proposed non-retention and an opportunity for an administrative hearing.

The parties do not dispute that the First Amendment protects a non-tenured professor from a non-retention based on protected expression. Although non-tenured professors have judicial forums available to them, this Court has required that minimal due process be provided where fundamental interests are at stake. "Freedom of expression must be ringed about with adequate bulwarks." *Blount v. Rizzi*, 400 U. S. 410, 416 (1971). Such procedural requirements go beyond the personal interests of the parties involved and look to the community interest in free and vigorous debate.

In the present case, the reasons for Roth's non-retention were based, at least in part, on his expressions of opinion. These reasons were contained in a memorandum prepared for the University President but Roth was not provided a copy of the memorandum or an opportunity for an administrative hearing. Although the presence of the First Amendment controversy in this case is another reason for requiring minimal due process, such procedural protections must be provided in all cases in order to protect the First Amendment rights of non-tenured professors.

Non-tenured professors must also be provided with minimal due process when a non-retention decision is be-

ing made because, on balance, their interest in minimal due process outweighs the government interest in summary adjudication. *Goldberg v. Kelly*, 397 U. S. 254 (1970). In addition to their interest in employment, non-tenured professors had a substantial interest in preventing non-retention decisions based on arbitrary reasons as well as an interest in preventing injury to their professional reputations.

There is no substantial burden on the University in being required to provide non-tenured professors with a statement of reasons. Likewise, the limited number of hearings likely to be required will not be burdensome.

Finally, the District Court did not blur the distinction between tenure and lack of tenure but was careful to point out that the standard for non-retention of non-tenured professors is considerably less severe than the standard of "cause" as has been applied to tenured professors.

ARGUMENT

I. THE PROTECTION OF FIRST AMENDMENT RIGHTS REQUIRES THAT MINIMAL DUE PROCESS BE PROVIDED TO NON-TENURED PROFESSORS WHOSE EMPLOYMENT IS NOT BEING RENEWED.

The issue before this Court is whether the First and Fourteenth Amendments to the United States Constitution required that Roth, a non-tenured university professor, be provided with minimal due process before a decision not to retain him for another academic year could be made. If this Court were to rule that the procedural safeguards of minimal due process are required by the First Amendment, there would be no need to reach the question of whether Fourteenth Amendment procedural due process also requires that such protections be provided to university professors faced with non-retention decisions.[4]

A. *The First Amendment Requires That Non-Tenured Professors Be Provided Procedural Safeguards As A Protection From Improper Non-Retention Decisions.*

Because of the danger that the reasons for not retaining a non-tenured university professor will implicate fundamental First Amendment values, state universities must be

[4]Roth's additional claim that the non-retention decision violated his substantive First Amendment rights and was arbitrary was stayed by the District Court which reasoned that if Roth "is now furnished with a statement of the reasons for his non-retention, notice of an administrative hearing and a hearing, I believe that the remaining issues in this case will have been clarified and that they will become more amenable to resolution." (A. 173-174) This substantive branch of the case is not before this Court.

constitutionally required to provide non-tenured professors with a statement of reasons for their proposed non-retention and an opportunity for an administrative hearing.[5]

It is undisputed that the decision not to retain Roth for the 1969-1970 academic year was based, at least in part, on his public criticism of the University's treatment of black students alleged to have been involved in a campus disturbance. (A. 123, 127-129, 137) Whether such expressions of opinion on the part of a university professor would be protected by the First Amendment ultimately depends upon a balancing of the interests of the parties involved similar to that undertaken in *Pickering v. Board of Educ.*, 391 U. S. 563, 568 (1968).[6]

Nevertheless the danger of such non-retention decisions jeopardizing First Amendment or other fundamental interests is substantial enough to justify the conclusion that minimal due process must be extended to all non-tenured professors.

Although this Court has never dealt at length with the question of the constitutional significance of a statutory tenure system, this Court has accorded substantive First Amendment protections to teachers who had not achieved tenure under applicable state law. See, e.g., *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Shel-*

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[5]This Court has noted that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U. S. 479, 487 (1960). *See also Wieman v. Updegraff*, 344 U. S. 183, 195 (1952) and *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957).

[6]This Court has rejected the proposition that public employees, including teachers, may be asked to surrender fundamental First Amendment rights as a condition of public employment. *See, e.g., Wieman v. Updegraff, supra; Pickering v. Board of Education, supra. See also*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

ton v. Tucker, 364 U. S. 479 (1960). The University does not dispute the proposition that the First Amendment places limitations on its power to terminate non-tenured as well as tenured professors.[7]

However, in refusing to extend procedural protections to non-tenured professors, the University has relied on the principle that government employment in the absence of legislation can be revoked at the will of the appointing officer. See *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 896 (1961); *Vitarelli v. Seaton*, 359 U. S. 535, 539 (1959). Such cases involving employees other than university professors must be read in conjunction with the line of cases that has extended procedural protections to teachers where none were provided under state law. See *Connell v. Higginbotham*, 403 U. S. 207 (1971); *Slochower v. Board of Higher Educ.*, 350 U. S. 551 (1956). *Cf. Bell v. Burson*, 402 U. S. 535 (1971).

The applicability of minimal due process reqirements depends upon a balancing of the private and public interests involved. See *Goldberg v. Kelly*, 397 U. S. 254, 263 (1970).

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[7]This concession that the First Amendment does not distinguish between teachers on the basis of their tenure status when the [substantive] protection of First Amendment rights . . . is the issue, . . ." see Petitioners' Brief at 20, is significant in light of the pendency of *Perry v. Sindermann*, No. 70-36. In *Perry* this Court is being asked to resolve the conflict between the Tenth Circuit which has held that, unless statutes or contracts provide to the contrary, non-retention decisions may be made for any and all reasons, including First Amendment activities, and every other Circuit which has spoken on the question of the substantive First Amendment rights of non-tenured teachers. *Compare, Jones v. Hopper*, 410 F. 2d 1323 (10th Cir. 1969), *cert. denied*, 397 U. S. 991 (1970) with *McLaughlin v. Tilendis*, 398 F. 2d. 287 (7th Cir. 1968); *Pred v. Board of Public Instruction*, 415 F. 2d. 851 (5th Cir. 1969); *Drown v. Portsmouth School Dist.*, 435 F. 2d. 1182 (1st Cir. 1970), *cert. denied*, 402 U. S. 972 (1971); *Orr v. Trinter*, 444 F. 2d. 128 (6th Cir. 1971), *petition for cert. filed*, 40 U. S. L. W. 3081 (U. S. August 18, 1971) (No. 71-249); *Freeman v. Gould Special School Dist.*, 405 F. 2d. 1153 (8th Cir.) *cert. denied*, 396 U. S. 843 (1969).

Where fundamental First Amendment values are at stake, this Court has fashioned procedural rules designed to protect such values. See *Speiser v. Randall*, 357 U. S. 513 (1958). "[F]reedoms of expression must be ringed about with adequate bulwarks." *Blount v. Rizzi*, 400 U. S. 410, 416 (1971). See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). *Cf. United States v. Robel*, 389 U. S. 258, 281-282 (1967) (Brennan, J., concurring). Such procedural devices go beyond the personal interests of the parties involved and look to the community interest in continued free and vigorous debate.

In affirming the District Court, the Seventh Circuit ruled that the university must "initially shoulder the burden" of providing the professor with the reasons for the non-retention decision and of exposing such reasons to a limited test at a hearing. (A. 178) Absent such procedural requirements, non-tenured professors dissatisfied with their non-retention would have no recourse but to seek judicial relief.

The University, on the other hand, relies heavily on the existence of judicial forums to justify its refusal to provide non-tenured professors with minimal due process.[8] However, where important interests are at stake, the existence of judicial or administrative remedies has not pre-

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[8]The University correctly suggests that courts are more adept than university administrators at deciding difficult constitutional questions. Petitioner's Brief at 16. Reliance on this point, however, misconstrues the reason for providing minimal due process. By giving non-tenured professors a statement of reasons and an opportunity for a hearing, the university may be able to resolve many non-retention disputes *without* court action. In any event, the university is surely qualified to evaluate "academic" reasons for non-retention. Finally, where factual disputes exist as to the accuracy of the reasons for a proposed non-retention, a prompt administrative resolution should be in the university's as well as the professor's interest.

vented this Court from requiring the states to develop procedural protections better suited to safeguard such values. "'The fundamental requisite of due process of law is the opportunity to be heard.' . . . The hearing must be at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U. S. 254, 267 (1970). See also, *Snaidach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Escalera v. New York City Housing Authority*, 425 F. 2d. 853, 864 (2nd Cir. 1970), *cert. denied*, 400 U. S. 853 (1971).

Notwithstanding its reliance on the availability of judicial forums, the University refuses to make available the statement of reasons which would enable a non-tenured professor to make a reasoned decision as to whether he will challenge a non-retention decision. Since the reasons for non-retention would be available through discovery after an action was commenced, it is difficult to understand why such reasons could not be furnished initially to all teachers when advised of a proposed non-retention.

At one point, the university has suggested that the administrative remedies required by the District Court and affirmed by the Seventh Circuit will not effectively protect First Amendment Rights which can only be protected in the Courts. Petitioner's Brief at 16-19.[9]

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[9]Apparently petitioners assume that universities will determine these minimal procedural protections by wilfully failing to provide non-tenured teachers with the true reasons for the non-retention.

Where the stated reasons are sham and where the ultimate decision maker is not impartial, the chances of the non-tenured teacher achieving a successful administrative resolution of his dispute may be slim. However, even in such cases the receipt of reasons would assist the teacher in "exposing any retributive effort infringing on . . . academic freedom. . . ." *Drown v. Portsmouth School Dist.*, 435 F. 2d. 1182, 1184 (1st Cir. 1970) *cert. denied*, 402 U. S. 972 (1971); *Cf. Johnson v. Branch*, 364 F. 2d. 177 (4th Cir. 1966), *cert. denied*, 385 U. S. 1003 (1967).

(Continued on next page)

Such reasoning ignores the fact that few professors, faced with non-retention decisions, will seek judicial relief. Litigation and the attendant public exposure may be costly both in terms of money and personal embarrassment. Moreover, without a statement of reasons, the professor has only two alternatives: quietly acquiesce in the non-retention or begin a major law suit based on his suspicion that the reasons behind the non-retention were constitutionally impermissible.

This lack of a sensible middle alternative poses the danger of non-retention decisions being made on impermissible First Amendment grounds without professors having effective means of acting to protect their interests. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Speiser v. Randall*, 357 U. S. 513, 526 (1958).

(Continued from last page)
Despite the suggestion that the minimal procedures will provide only an illusory safeguard for teachers, the National Education Association, the American Association of University Professors and the American Federation of Teachers, the three major organizations representing teachers, have taken a contrary view and have submitted briefs as amicus curiae either in this case or in *Perry v. Sindermann*, No. 70-36. Respondent suggests that these organizations have a greater claim to speak for teachers than do petitioners.

B. *Because The Reasons For His Non-Retention Implicated First Amendment Rights, Roth Was Entitled To Minimal Due Process.*

The facts of this case required that Roth be provided with a statement of the reasons and an opportunity for a hearing before the non-retention decision could be made.

In Wisconsin, non-tenured state university professors faced with non-retention decisions are not provided minimal due process. Typically, the university notifies the professor that his contract will not be renewed. No reasons are offered by the University and none will be provided; nor is the professor provided with an administrative hearing at which he can contest either the factual basis of the decision or the reasoning behind it. (A. 121-122)

Such decision may, in fact, rest totally or partially upon the professor's First Amendment activities. Roth, for example, was charged with having violated several minor university rules and for making "public statements . . . that indicate[d] a very unscholarly approach to the truth and the search for knowledge . . . ," (A. 127) These charges were contained in a memorandum to defendant Guiles, the President of the University, who then made his decision for non-retention entirely on this memorandum and the recommendations provided to him, "without making a personal investigation of the facts, and without substituting my judgment for that of the vice president of academic affairs and the dean." (A. 123)

Had Roth been provided with the statement of reasons contained in the memorandum and in the recommendation of the Tenure Committee and with an opportunity for a hearing on these reasons, the non-retention decision

may have been reversed. For each of the non-First Amendment reasons contained in the memorandum recommending his non-retention, Roth had either a full or a partial answer. (A. 137-145)

The facts surrounding Roth's non-retention illustrate the need for at least minimal due process, including a statement of the reasons and a hearing, in reaching non-retention decisions. However, the Seventh Circuit suggested an alternative holding by pointing out that the First Amendment controversy in which Roth was involved presented a narrower basis for extending the protection of minimal due process in the present case only.

> "The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (A. 181)

Respondents believe that the true "prophylactic" effect desired by the Seventh Circuit can only be accomplished by extending procedural due process to all non-tenured teachers, irrespective of whether there exists a "background of controversy and unwelcome expressions of opinion." Such an approach would avoid a *post hoc* determina-

tion that would require universities to pick and choose among their non-tenured teachers in determining what kind of procedures, if any, are to be provided. Such an approach would also permit the courts to forego a case-by-case examination of the facts in order to determine whether a hearing should have been granted. See Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 DUKE L. J. 841, 874-879.

In any event, were this Court to decide not to reach the broader issue of whether minimal procedural rights should be extended to all non-tenured professors faced with non-retention, the facts herein clearly support the decision to require a statement of reasons and a hearing.

Unlike the situation in which the decision for non-retention rests upon subtle and difficult to articulate reasons, the reasons in this case involved alleged violations of university rules and regulations and were, in fact, articulated in a detailed memorandum prepared for the convenience of the decision maker. The burden on the university of providing Roth with a copy of such reasons and an opportunity for a hearing was minimal. See *Goldberg v. Kelly,* 397 U. S. 254 (1970). Moreover, in light of the remarkable candor of the memorandum and the abrupt change in position of the Tenure Committee, it was incumbent on the University President, defendant Guiles, to extend minimal due process to Roth in order to insure that the persons making the non-retention recommendation had not either inadvertently or wilfully relied on Roth's protected activities.

II. THE PROCEDURAL DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT REQUIRES THAT DECISIONS NOT TO RETAIN NON-TENURED PROFESSORS BE ACCOMPANIED BY MINIMAL DUE PROCESS.

As discussed in the preceding section, the record in the present case demonstrates that safeguarding essential First Amendment expression required that Roth be accorded minimal due process, including a statement of reasons and hearing, prior to the decision not to retain him as a state University professor. Independent of such First Amendment considerations, the Due Process Clause of the Fourteenth Amendment also requires that non-tenured professors at state universities be given minimal due process when a non-retention decision is made.

This Court has held that where the government proposes action which would seriously injure a person it must be accompanied by procedures which accord that person at least minimal or rudimentary due process. *Goldberg v. Kelly*, 397 U. S. 254 (1970). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Munzo*, 380 U. S. 545, 552 (1965). This Court has observed that "relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as . . . to discharge from public employment," *Goldberg v. Kelly*, 397 U. S. at 262.

The extent to which procedural due process must be provided a non-tenured professor faced with non-retention is "influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether . . . [his] interest in avoiding that loss outweighs

the governmental interest in summary adjudication." *Id.* at 263. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961).

Unless the university can show the existence of substantial governmental interests which are jeopardized by the lower courts' requirements of a statement of reasons and an opportunity for a hearing on the non-retention, such minimal due process rights should be provided. *Cf. Parker v. Lester*, 227 F. 2d 708, 718 (9th Cir. 1955).

A. *Non-Tenured Professors Have A Substantial Interest In Receiving A Statement Of Reason And A Hearing When A Decision Not To Retain Them Is Made.*

In striking the balance necesary to determine whether the requirements of procedural due process entitle a non-tenured professor to the safeguards of a statement of reasons and an administrative hearing when a decision not to retain him is made, the Courts below identified two non-First Amendment[10] interests of non-tenured professors in addition to their interest in retaining their jobs which are threatened by the university's summary procedure.

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[10] A non-tenured professor's interest in avoiding a non-retention decision based on the exercise of First Amendment rights is discussed in this Brief, *supra*, at pp. 13-21.

(1) Freedom From Arbitrary Non-Retention

The non-tenured professor has an interest in not having a non-retention decision based upon reasons that are arbitrary and capricious in violation of the substantive protections of the Fourteenth Amendment. In concluding that "substantive constitutional protection for a university professor against . . . arbitrary non-retention is useless without procedural safeguards," (A. 166) the District Court stated that "the decision not to retain a professor employed by a state university may not rest on a basis wholly without reason." (A. 165)

"The protection of the individual against arbitrary action . . . [is] the very essence of due process." *Slochower v. Board of Higher Educ.*, 350 U. S. 551, 559 (1956). As this Court stated in *Wieman v. Updegraff*, 344 U. S. 183, 192 (1952):

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to a public servant whose exclusion pursuant to a statute is patently arbitrary."

These principles are equally applicable where the non-retention is patently arbitrary pursuant to an administrative decision.

Respondents do not propose to attempt to define the precise standard to be used to determine what constitutes a violation of the substantive protections of the Fourteenth Amendment's Due Process requirement. Such determination must await a case-by-case development. *Cf. Pickering v. Board of Educ.*, 391 U. S. 563, 574 (1968). However

there must be *some* reasons for non-retention which are so "wholly without support" that reliance on them constitutes a violation of the limited test proposed by the District Court. See, *e.g., Schware v. Board of Bar Examiners,* 353 U. S. 232 (1957); *Thompson v. City of Louisville,* 362 U. S. 199 (1960); *Drown v. Portsmouth School Dist.,* II, — F. 2d. — (1st Cir. December 1, 1971) (Slip Op.).

(2) Injury to Professional Reputation

This Court has held that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U. S. 433, 437 (1971). Such considerations are particularly relevant where a person's ability to pursue his career are at stake. See, e.g. *Willner v. Committte on Character & Fitness,* 373 U. S. 96 (1963); *Birnbaum v. Trussell,* 371 F. 2d. 672 (2nd Cir. 1966).

In discussing the consequence of non-retention on a non-tenured professor's career, the District Court observed that:

> "There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him [of a non-retention decision] probably will be serious and prolonged and possibly will be severe and permanent. 'Badge of infamy' is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." (A. 165)

In Roth's case, the danger to his professional reputation was caused not only by the non-retention decision but also by the reasons for such non-retention. Roth was not terminated for subtle, difficult to articulate reasons. Rather, the University relied on alleged breaches of University rules including misuse of class time and defiance of University administrators. (A. 125-127) In addition, he was said to have exhibited an "unscholarly approach to the truth and the search for knowledge that make[s] it doubtful [that] he has the quality of scholarship desirable in a faculty member." (A. 127) Respondents suggest that here, where the reasons for non-retention call into question not only the desirability of retaining the individual professor at the university but also his fitness to continue as a professor, it is essential to extend the protection of minimal due process.

On the other hand, if the reasons for non-retention do not question his teaching qualifications, it is equally important that he be furnished a statement of these reasons to avoid any negative implications as to the circumstances of his termination. See *Birnbaum v. Trussell*, 371 F. 2d. 672, 679 (2nd Cir. 1966).

B. *There Are No Substantial Governmental Interests Which Justify the Refusal to Provide Statements of Reasons and Hearings.*

In concluding that the University was constitutionally required to provide non-tenured professors with minimal due process, the District Court carefully considered the University's interest in maintaining a quality faculty. The Court recognized that this interest has been served by a

fairly lengthy probationary period followed by tenure status, and found that it is not adversely affected by requiring that reasons and a hearing accompany decisions not to retain non-tenured professors.

Requiring a written statement of the reasons in the instant case would impose no significant burden on the University. See *Drown v. Portsmouth School Dist.*, 435 F. 2d 1182, 1185 (1st Cir. 1970). Even where the reasons for non-retention are somewhat more subtle than those contained in the Darken memorandum, it is not unreasonable to require that they be furnished. The reasons need not be stated with precision nor need they be demonstrated with particularity. (A. 164-165) What is required is that they be honestly stated and that they not be "entirely arbitrary and capricious." *Drown v. Portmouth School Dist II*, — F. 2d. — (1st Cir. Dec. 1, 1971) (Slip Op.); *Wieman v. Updegraff*, 344 U. S. 183 (1952).

Having been furnished with a statement of the reasons it is essential that the professor be provided with an opportunity to explore and respond meaningfully to these reasons. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). See also, *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Greene v. McElroy*, 360 U. S. 474 (1954).

It is not necessary that the hearing be a formal proceeding. It must minimally prevent "summary dismissal from public employment without hearing or inquiry required by due process." *Connell v. Higginbotham*, 403 U. S. 207, —, 91 S. Ct. 1772, 1773 (1971). See also *Slochower v. Board of Educ., supra. Cf. Nostrand v. Little*, 362 U. S. 474 (1960); *Speiser v. Randall*, 357 U. S. 513 (1958).

It cannot be denied that minimal due process requires some additional effort by the administrators. It is not unduly burdensome to require that such minimal considerations be given to a professor whose employment is being terminated.[11] At Wisconsin State University-Oshkosh, for example, of four hundred forty-two non-tenured professors, four were not renewed during the 1968-1969 academic year.[12] (A. 124) Even if each professor had requested a written statement of reasons and the opportunity to be heard, the University's interest in careful, yet reasonably expeditious decisions would not have been jeopardized.

C. *The Distinction Between Tenure and Lack of Tenure was Preserved By The Courts Below.*

Because the District Court held that a non-retention decision must be accompanied by minimal due process, it has been argued that the distinction between tenured and non-tenured status will be ignored by university administrators (Petitioners' Brief at p. 16). The District Court, aware of the distinction between tenure and lack of tenure, carefully preserved the *substantive* difference between them

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[11]At least 18 states do extend some minimal procedures to non-tenured teachers in either higher or elementary and secondary educational systems. See National Education Association Brief as Amicus Curiae in *Perry v. Sindermann*, No. 70-36, at 19. In Wisconsin, elementary and secondary school teachers are given notice and the right to a conference before the school board before a non-retention can be made. See § 118.22, Wis. Stats. (1969). This is commonly accompanied by a prior statement of the reasons. *See Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984 (W. D. Wis. 1970).

[12]Petitioners' Brief at 18, n, 11, cites Circuit Judge Duffy's dissenting opinion (A. 185) as authority for the fact that 206 non-tenured teachers at the prior State University systems, which consisted of ten four-year and a number of two-year institutions, had not been renewed. This figure was not in the record at any stage of the proceedings herein and first appeared in Appellants' Brief to the Court of Appeals, p. 23, n. 13.

while requiring minimal *procedural* safeguards for the non-tenured professor.

The District Court clearly stated that the "standard [for non-retention of a non-tenured professor] is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." (A. 165-166). See, *State ex rel. Ball v. McPhee*, 6 Wis. 2d. 190, 94 N. W. 2d. 711 (1959); See also Developments—Academic Freedom, 81 HARV. L. REV. 1045, 1904-1099 (1968). Thus, the requirement that university administrators provide non-tenured professors with minimal due process does not in itself place any substantive limitations on their power to hire and fire non-tenured professors. Finally, to suggest that universities will only employ "homogonized mediocrities" (see Petitioner's Brief, at p. 22) if minimal due process is required, is to question both the competence and good faith of university administrators.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Court of Appeals be affirmed.

Respectfully Submitted,

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